UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Wanda Boston

v.

Civil No. 10-cv-00250-PB
Opinion No. 2011 DNH 099

Michael J. Astrue, Commissioner, Social Security Administration

MEMORANDUM AND ORDER

Wanda Boston challenges the Social Security Commissioner's denial of her application for disability insurance benefits. Boston contends that the administrative law judge incorrectly found that she was not disabled. For the reasons set forth below, I affirm the Commissioner's decision.

I. BACKGROUND

A. Administrative Proceedings

On June 23, 2008, Wanda Boston filed an application for Disability Insurance Benefits ("DIB"), alleging disability as of November 15, 2007. (Tr. 96-103). After her application was denied, Boston requested an administrative hearing. (Tr. 47). On January 11, 2010 an Administrative Law Judge ("ALJ") held a

hearing at which Boston, who was represented by counsel, appeared and testified. (Tr. 4-26). On January 27, 2010, the ALJ issued his decision finding that Boston was not disabled. (Tr. 27-41). After the Decision Review Board failed to complete its review within the allotted time, the ALJ's decision became final and ripe for judicial review.

B. Introduction

Boston was 49 years old when the ALJ issued his decision. (Tr. 7). Boston alleged disability due to pain and problems involving her "back and right side" that affected her ability to stand for long periods of time. (Tr. 121-22, 146). In the disability report filed with her appeal Boston also noted, for the first time, that she was receiving counseling. (Tr. 146-47).

C. Physical Impairments

Notes from Dr. Hoke Shirley indicate that Boston suffers from rheumatoid arthritis[1]. (Tr. 182, 240-41). On December 7,

[1] "Rheumatoid Arthritis" is a "chronic systemic disease primarily of the joints . . . usually marked by inflammatory changes in the synovial membranes and articular structures and by muscle atrophy and rarefaction of the bones." Dorland's Illustrated Medical Dictionary 152, 159 (31st ed. 2007).

2006, Dr. Shirley noted that, upon examination, Boston had a full range of motion in the joints of her extremities. (Tr. 182). However, Boston's then current medications were not working. (Tr. 182-83). Dr. Shirley "[n]oted osteoarthritic change superimposed in the right knee" and he reported that Boston needed "additional therapy to methotrexate[2] to control her rheumatoid disease." (Tr. 182). Accordingly, Dr. Shirley recommended alternative medication and other treatment. (Tr. 183).

On January 11, 2007, Dr. Shirley noted that Boston was tolerating her new medication well and that her rheumatoid disease was better controlled. (Tr. 180). She had a full range of motion in most extremity joints. (Tr. 180).

On March 8, 2007, Dr. Shirley reported that Boston had done extremely well, without any "flare-ups" in her extremities. (Tr. 178). Boston reported a "little increased articular pain" in her hands and feet occasionally. (Tr. 178). She had a full range of motion in all extremity joints. (Tr. 178).

[2] "Methotrexate" refers to "a folic acid antagonist that acts by inhibiting synthesis of DNA, RNA, thymidylate, and protein" and is used in the treatment of rheumatoid arthritis. Id. at 1169.

On May 17, 2007, Dr. Shirley noted that Boston was "not doing as well," having reported pain in her hands, wrists, and feet. (Tr. 175). Examination showed some limitation of motion in her left wrist, but a good range of motion in other extremities. (Tr. 175). Dr. Shirley opined "one cannot deny the irrefutable erosive disease and joint space narrowing that are noted in the hand and foot films. I do think she has mildly active disease." (Tr. 222).

On July 16, 2007, Dr. Shirley stated that Boston was "doing pretty well." (Tr. 173). Boston had her gallbladder removed, and Dr. Shirley opined that Boston's "flare-up" had been due to the gallbladder disease. (Tr. 173). On September 12, 2007, Dr. Shirley noted that Boston had gone off her medication, but was "not flaring-up too badly." (Tr. 171). She had a full range of motion in all extremity joints except the right knee. (Tr. 171). Dr. Shirley stated that Boston's rheumatoid disease remained under good control. (Tr. 171).

On October 31, 2007, Dr. Shirley noted that Boston was doing relatively well. (Tr. 218). She had "a little

dislocation of her right knee" and some pain on patellofemoral[3] pressure testing with some crepitus[4], but otherwise had a full range of motion. Weakness was noted in her right quadriceps muscle and there also trace effusion[5] of the right knee. (Tr. 218). On December 7, 2007, Boston was given a knee brace. (Tr. 217).

On January 7, 2008, Dr. Shirley noted that Boston was experiencing "severe pain with abduction[6], both with passive maneuvers and on forced maneuvers of that left shoulder where she has pain on forced external rotation and a little pain on forced internal rotation. . . . Apprehension[7] test is severely painful." (Tr. 169). Dr. Shirley's assessment of Boston indicated that she had "substantial rotator cuff issues in the

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3 "Patellofemoral" is defined as "pertaining to the patella [bone situated at the front of the knee] and the femur [bone that extends from the pelvis to the knee]." Id. at 696, 1415.

4 "Crepitus" is a "grating sensation caused by the rubbing together of the dry synovial surfaces of joints." Id. at 437.

5 "Effusion" is the "escape of fluid into a part or tissue." Id. at 603.

6 "Abduction" is the "draw[ing] away from the median plane or (in the digits) from the axial line of a limb." Id. at 2.

7 "Apprehension" is "anticipatory fear or anxiety." Id. at 122.

right shoulder." (Tr. 169). Boston otherwise had a full range of motion in all extremity joints. (Tr. 169).

On March 10, 2008, Dr. Shirley noted that Boston was reporting increased pain down her right leg that had persisted for three or four weeks. (Tr. 167). Upon examination, she was missing the right knee reflex. (Tr. 167). She had a full range of motion in all extremity joints and no pain with straight leg raising. Strength testing was 5/5. (Tr. 167). Dr. Shirley stated that Boston was doing reasonably well with her rheumatoid disease, but her "right knee, as usual, has a lot of crepitus and a 1+ effusion" and her disease was still bothering her. (Tr. 167).

On April 15, 2008, Dr. Shirley stated that, chronically, Boston's rheumatoid arthritis was not active. (Tr. 166). Boston complained, however, of mechanical back pain, as well as osteoarthritis pain in her right knee. (Tr. 165). Dr. Shirley noted that Boston had some soft-tissue pain in her back, but was otherwise doing well. (Tr. 166). Upon examination, Boston did have some tender points in her neck, shoulder, back, and hip, but had a good range of motion in most extremity joints and negative straight leg raising. (Tr. 165). Dr. Shirley noted

that Boston had used more narcotic medication than he would have expected given her back pain. (Tr. 165). He proceeded to perform bilateral trigger point injections of Depo-Medrol[8] and lidocaine[9]. (Tr. 166).

Medical notes dated April 28, 2008, indicate that Boston complained of increasing back pain. (Tr. 188). She reported her pain as an 8 on a 0-10 scale. (Tr. 188). Boston received a minor diagnosis of back pain, which appeared to be soft-tissue in origin. (Tr. 190). Robaxin[10] was prescribed. (Tr. 191).

On June 4, 2008, Boston visited the emergency room after falling down some stairs. (Tr. 303). She was complaining about pain in her right hip, leg, and knee. (Tr. 303). She was diagnosed with right-sided pain after a fall. (Tr. 304). A

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[8] "Depo-Medrol" is the "trademark for preparations of methylprednisolone acetate." Id. at 499. "Methylprednisolone acetate" is "used in replacement therapy for adrenocortical insufficiency and as anti-inflammatory and immunosuppressant in a wide variety of disorders." Id. at 1171.

[9] "Lidocaine" is "a drug having anesthetic, sedative, analgesic, anticonvulsant, and cardiac depressant activities, used as a local anesthetic, applied topically to the skin and mucous membranes." Id. at 1048.

[10] "Robaxin" is a "trademark for preparations of methocarbamol." Id. at 1675. "Methocarbamol" is "a skeletal muscle relaxant." Id. at 1165.

radiology report on Boston's right knee showed mild osteoarthritis. (Tr. 307). Three days later, Boston visited the emergency room again, complaining of continued right leg pain. (Tr. 301). She was diagnosed with right leg pain secondary to a contusion. (Tr. 302).

On June 11, 2008, Dr. Shirley noted that Boston had a degenerative knee. (Tr. 212). Boston had also slipped on some steps and had hurt her knee and hip. (Tr. 212). Boston was doing reasonably well with her rheumatoid disease. (Tr. 212). Boston had "a little quadriceps weakness in her right knee" as well as effusion, but otherwise had a full range of motion. (Tr. 212). Straight leg raising was negative. (Tr. 212).

On July 2, 2008, in her function report, Boston indicated that her daily activities consisted of showering, taking her medications, watching television, doing laundry, sweeping and washing floors, taking out the trash, reading, taking care of her dogs, cats, and fish, visiting with her grandchildren, and taking care of her husband. (Tr. 128-30). She had no problems bathing, caring for her hair, shaving, or using the toilet. (Tr. 129). She stated she occasionally had problems buttoning and zipping her clothes, cutting food, and opening things. (Tr.

129). She did not need reminders to take care of herself, to take her medications, or to go places. (Tr. 130, 132). She was able to prepare simple, one-course meals. (Tr. 130). She could drive, and would go shopping for food, household items, and medication. (Tr. 131). She was able to manage her finances. (Tr. 131). She socialized with friends once or twice a month, enjoyed reading and watching television. (Tr. 131). She estimated that she could lift 10-15 pounds, but stated that she could not squat or kneel, that climbing stairs was difficult, and that she could not stand for long or walk long distances. (Tr. 133). She also stated she was losing her eyesight and wore glasses. (Tr. 134). She had no problem paying attention or following instructions. (Tr. 133). She had no problem getting along with others, handled stress well most of the time, and could handle changes in her routine. (Tr. 134).

Boston visited the emergency room on July 23, 2008, complaining of back pain radiating into her right leg. (Tr. 296). She was diagnosed with lumbar pain. (Tr. 297). On August 1, 2008, Boston again visited the emergency room complaining of back pain radiating into her right leg. (Tr.

294). She was diagnosed with lumbar radiculopathy[11]. (Tr. 295).

On August 12, 2008, Dr. Dominic Geffken wrote a letter outlining Boston's medical problems and stating that they had affected her ability to work. (Tr. 234). A radiology report from August of 2008 showed mild degenerative changes in Boston's lumbar spine. (Tr. 293).

On September 19, 2008, Dr. Shirley noted that Boston had undergone an MRI of her back. (Tr. 238). It showed minimal degenerative disc disease and degenerative joint disease of her lumbar spine, but no evidence of central or foraminal stenosis[12] or substantial discogenic[13] injury. (Tr. 238). In addition to back pain, Boston reported "increasing pain in the wrists, the knuckles, bilaterally in the knees, and certainly in the forefeet, bilaterally." (Tr. 238). These symptoms were said to be "consistent with some findings on her examination." (Tr. 238). A few days later, Boston injured her right wrist while

[11] "Radiculopathy" is a "disease of the nerve roots." Id. at 1595.

[12] "Stenosis" is "an abnormal narrowing of a duct or canal." Id. at 1795.

[13] "Discogenic" is "caused by the derangement of an intervertebral disc." Id. at 534.

doing laundry and was diagnosed with a contusion. (Tr. 280-81).

On January 7, 2009, Boston reported substantial hip pain. (Tr. 236). She was doing pretty well with her peripheral arthritis and rheumatoid disease. (Tr. 236). Her right knee was still a problem, but she had a full range of motion in all joints. (Tr. 236). Dr. Shirley stated, however, that Boston was quite limited in her functional capacity and opined that she did not think she could work full-time in any capacity. (Tr. 236). She was described as having "dysfunctional lumbar pain" and "substantial post-inflammatory osteoarthritis of the right knee." (Tr. 236).

Boston fell and injured her right hand in January of 2009. No acute process was detected, and she was diagnosed with a wrist sprain. (Tr. 266, 268). She fell and injured her right shoulder in February of 2009 and was diagnosed with a contusion. (Tr. 248-249).

On March 9, 2009, Dr. Shirley stated that Boston was doing fairly well from an inflammatory disease standpoint with her rheumatoid disease. (Tr. 235). However, it was noted "[h]er back pain is another problem that is certainly and currently not well-controlled." (Tr. 235). Boston reported some right hip

pain that had increased after a slip and fall. (Tr. 235). Dr. Shirley noted that Boston had substantial lumbar dysfunctional pain without discogenic abnormalities noted on an MRI. (Tr. 235). She had a good range of motion in most extremity joints. (Tr. 235). "Further infusions" were recommended. (Tr. 235).

From May 13, 2009 through November 24, 2009, Boston made several visits to Concord Hospital for exacerbation of chronic back pain, migraine headache, chest pain, vomiting, injuries from falls, right knee problems, hip pain, and right radicular leg pain. (Tr. 381-417).

D. Mental Impairments

On August 25, 2008, Boston reported that she had started counseling with Maryann Simoni, M.A. (Tr. 146-47). On September 9, 2008, she noted she was seeing Ms. Simoni for "mental health sessions" and that she had also had an appointment with a psychiatrist, William Dinon, Ph.D., on September 12, 2008, for a psychiatric evaluation. (Tr. 153). Records from Concord Hospital Family Health Center indicate Boston was seen for counseling with David R. Twyon, MSW, LICSW on July 9, 2008. (Tr. 554-56). She thereafter started sessions with Ms. Simoni on August 5, 2008 and continued to see her on

August 18, 2008, August 25, 2008, September 16, 2008, and October 9, 2008. (Tr. 521-24, 529-30, 534-35, 542-47). Ms. Simoni opined that Boston suffered from "309.0 Adjustment Disorder with Depressed Mood" and rule/out "300.4 Dysthymic Disorder." (Tr. 544).

She was assigned a Global Assessment of Functioning (GAF) score of 62.[14] (Tr. 544).

E. Physician Assessments

On July 15, 2008, Dr. Charles Meader completed a physical residual functional capacity (RFC) assessment on behalf of the Agency. (Tr. 226-33). Dr. Meader concluded that Boston could lift and carry up to ten pounds occasionally and frequently. (Tr. 227). He found she could stand and/or walk for at least two hours in an eight-hour workday and that she could sit for up to six hours in an eight-hour workday. (Tr. 227). According to Dr. Meader, she had an unlimited ability to push and pull; could occasionally climb, balance, stoop, kneel, crouch, and crawl; and was advised to avoid concentrated exposure to temperature

[14] A GAF of 61-70 indicates some mild symptoms (e.g., depressed mood and mild insomnia) or some difficulty in social stressors and no more than a slight impairment in social, occupational, or school functioning. Diagnostic and Statistical Manual of Mental Disorders 34 (4th Ed. 2000).

extremes and hazards (machinery, heights, etc.). (Tr. 228-30). Dr. Meader indicated that "[m]ost weight is given to Dr Hoke Shirley, MD, rheumatologist, the treating source." (Tr. 233).

On July 2, 2009, Dr. Shirley completed a questionnaire in which he opined Boston had significant functional limitations. (Tr. 375-80). Dr. Shirley stated that Boston's pain would "often" interfere with her attention and concentration, that she has "good days" and "bad days" and would be absent from work more than four times per month. (Tr. 379). Dr. Shirley opined that Boston could walk for one-half of a block without rest or severe pain; sit for 30 minutes continuously; stand for 15 minutes continuously; stand/walk for about two hours in an eight-hour workday; sit for about four hours in an eight-hour workday; and needed employment that would allow her to shift positions at will from sitting, take unscheduled breaks during an eight-hour workday every two hours and rest for 15-20 minutes before returning to work. (Tr. 377-78). Dr. Shirley further opined that with prolonged sitting, Boston's legs needed to be elevated waist high and if working a sedentary job, her legs should be elevated 30% of an eight-hour workday. (Tr. 378). Dr. Shirley stated that Boston could occasionally lift less than

10 pounds, and her hands, fingers, and arms could grasp, turn, and twist, finely manipulate, and reach, respectively, for 20% of an eight-hour working day. (Tr. 378-79). He concluded that Boston could never stoop or crouch and had difficulties with extreme temperatures. (Tr. 379).

F. Hearing Testimony

Boston testified that she was unable to work due to arthritis in her knees and feet, as well as bad wrists and fingers. (Tr. 9). She also testified to having lupus and fibromyalgia and added that she had occasional migraines. (Tr. 9).

On a typical day, she watched television and read occasionally. (Tr. 10). Once per week, she would clean the house and do laundry. (Tr. 10). She was able to lift a 12-pack of soda, which she estimated to be about 10 pounds. (Tr. 10). She estimated that she could walk one-half a block and that she could stand for 10-15 minutes. (Tr. 17). She was able to drive when necessary. (Tr. 10). She testified that she suffered from pain constantly and that her medications did not completely relieve her pain, but did numb it. (Tr. 11, 18). She stated that her pain interfered with her ability to concentrate. (Tr.

11-12, 16). She experienced pain in her lower back, right leg, feet, knees, hips, hands, and wrists. (Tr. 12-16). She said that she spent most the day with her feet up and that she slept in a reclining chair. (Tr. 13-15). She testified that she could not use a computer due to the pain in her hands and wrists. She had difficulty buttoning shirts. (Tr. 15).

A vocational expert ("VE") also testified at the hearing. (Tr. 19-25). The ALJ asked the VE whether an individual who could lift only ten pounds but who could walk or stand for up to four hours per eight-hour workday and sit for up to six hours per eight-hour workday, push and pull without limitation, and who needed to avoid concentrated exposure to temperature extremes and hazards, could perform Boston's past relevant work or other work that existed in significant numbers in the national economy. (Tr. 21).

The VE testified that Boston could perform her previous job as a sewing machine operator. (Tr. 21). The VE further testified that there were other jobs existing in significant numbers in the national economy which Boston could perform. (Tr. 22). Specifically, he testified that she could perform the following jobs: telemarketer, DOT 299.357-014 (1,000 regionally

and 350,000 nationally); optical lens assembler, DOT 713.687-018 (50 regionally and 5,000 nationally); eye glass frame polisher, DOT 713.684-038 (50 regionally and 5,000 nationally); receptionist DOT 237.367-038 (500 regionally and 70,000 nationally); appointment clerk DOT 237.367-010 (500 regionally and 70,000 nationally); information clerk, DOT 237.367-022 (500 regionally and 70,000 nationally) data clerk, DOT 209.387-022 (200 regionally and 40,000 nationally); credit card clerk 209.587014 (200 regionally and 40,000 nationally). (Tr. 22-23).

G. The ALJ's Decision

The ALJ followed the five-step sequential evaluation process established by the Social Security Administration, as set forth at 20 C.F.R. § 404.1520, to determine whether Boston was disabled. (Tr. 30-37). Under the first step, the ALJ found that Boston had not engaged in substantial gainful activity since her alleged onset date. (Tr. 32). Under steps two and three, the ALJ found that Boston had the severe impairments of rheumatoid arthritis and lumbar degenerative disc disease but that Boston had no impairment(s) that met or equaled an impairment listed under Appendix 1, Subpart P of Social Security Regulations No. 4. (Tr. 32-33).

The ALJ went on to find that Boston retained the residual functional capacity (RFC) to perform sedentary work involving lifting up to ten pounds, walking or standing up to four hours per eight-hour workday, sitting for up to six hours per eight-hour workday, unlimited pushing and pulling, occasional bending, stooping, kneeling, crouching, climbing, or crawling, and no concentrated exposure to temperature extremes or hazards. (Tr. 33). The ALJ next found that Boston could perform her past relevant work as a sewing machine operator. (Tr. 35). Alternatively, he found that Boston could make an adjustment to other work in the national economy, noting VE testimony regarding the jobs of telemarketer, optical goods assembler, eyeglass frame polisher, clerical receptionist, appointment clerk, information clerk, data clerk, and credit card clerk. (Tr. 36). Accordingly, the ALJ found that Boston was not disabled at any time through the date of his decision. (Tr. 37).

II. STANDARD OF REVIEW

An individual seeking Social Security benefits has a right to judicial review of a decision denying his application.

See 42 U.S.C. § 405(g). I am empowered to affirm, modify, reverse or remand the decision of the Commissioner based upon the pleadings submitted by the parties and the transcript of the administrative record. See id. However, my review is limited to determining whether the ALJ used the proper legal standards and found facts based on the proper quantum of evidence. See Ward v. Comm'r of Soc. Sec., 211 F.3d 652, 655 (1st Cir. 2000).

The factual findings of the Commissioner are conclusive if they are supported by "substantial evidence." See id. Substantial evidence is evidence which a "reasonable mind, reviewing the evidence in the record as a whole, could accept . . . as adequate to support [the] conclusion." Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981). If the substantial evidence standard is met, the ALJ's factual findings are conclusive even if the record could support a different conclusion. See Irlanda Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 770 (1st Cir. 1991).

In addition, it is "the responsibility of the [ALJ] to determine issues of credibility and to draw inferences from the record evidence." Id. at 769. It is the role of the ALJ, and not the role of this court, to resolve conflicts in the

evidence. Id.

III. ANALYSIS

Boston challenges the ALJ's decision for several reasons. First, Boston faults the ALJ for failing to make findings with respect to Boston's mental status using the special technique for mental impairments outlined in 20 C.F.R. Section 404.1520a.[15] Next, Boston contends that the ALJ erred by failing to give Dr. Shirley's opinion controlling weight. Finally, Boston claims that the ALJ impermissibly determined that she had the RFC to perform her past relevant work and/or other sedentary work. I

[15] In addition Boston contends that the ALJ erred by failing to obtain the opinion of a psychiatrist or psychologist when presented with evidence of a potential mental impairment as required by 42 U.S.C. § 421(h). While best practices counsel that the ALJ should have consulted with a psychiatrist or psychologist before rending his opinion, 42 U.S.C. § 421(h) did not require him to do so in the instant case. Section 421(h) states that "an initial determination under subsection (a), (c), (g), or (i)" shall be made only if the Commissioner endeavors to obtain a qualified opinion. 42 U.S.C. § 421(h). By its terms, the precatory language of Section 421(h) does not apply to Section 421(d), which deals with ALJ hearings. As a result, because the first evidence of Boston's counseling only arose before her ALJ hearing (i.e. following her "initial determination" for benefits), the Commissioner did not run afoul of the requirements of Section 421(h). See Plummer v. Apfel, 186 F.3d 422, 433 (3rd Cir. 1999).

will address each argument in turn.

A. Mental Impairment Findings

In her initial application for benefits, Boston noted that she was not limited in her ability to work by emotional or mental problems. (Tr. 124). Later, in her "Disability Report-Appeal" form, Boston indicated that she had begun counseling since her initial benefits denial. (Tr. 146). Between August and December 2008, Boston saw Maryann Simoni, M.A., LCMHC for six (6) counseling sessions. (Tr. 521-24, 529-30, 534-35, 542-47). During this period, Boston also saw Dr. William Dinon for a psychiatric evaluation. (Tr. 153). A little less than two weeks before the ALJ's hearing, Ms. Simoni opined that Boston suffered from "Adjustment Disorder with Depressed Mood." (Tr. 544). Following these evaluations, Boston was assigned a GAF score of 62, indicating mild symptoms with no more than a slight impairment in social, occupational, or school functioning. (Tr. 544).

Boston claims that the ALJ erred in failing to make findings regarding her adjustment disorder using the special technique for mental impairments listed in 20 C.F.R. Section 404.1520a. The Commissioner contends that the ALJ was not

required to make such findings, and argues in the alternative that any error by the ALJ was harmless.

While it would have been prudent for the ALJ to address Boston's counseling, Boston has not adequately alleged that she suffers from a disabling mental impairment. See 20 C.F.R. 404.1520a(b)(1). The claimant bears the burden of providing medical evidence showing that he or she suffers from a medically determinable impairment that prevents him or her from working. See 20 C.F.R. §§ 404.1512, 404.1520(a)(4)(ii); Gray v. Heckler, 760 F.2d 369, 372 (1st Cir. 1985). In her application for DIB, Boston gave no indication that she suffered from any mental ailments. (Tr. 124). Moreover, when testifying in front of the ALJ, neither Boston nor her lawyer considered it worthwhile to offer or elicit any testimony about potential mental impairments and how these impairments prevented her from working. See 20 C.F.R. §§ 404.1512, 404.1520(a)(4)(ii); Gray, 760 F.2d at 372. While Boston now highlights the opinion of Ms. Simoni, Ms. Simoni is not an "acceptable medical source." See 20 C.F.R. §§ 404.1508, 404.1513(a)(2). Because Boston failed to carry her burden of establishing a medically determinable mental impairment, the ALJ is excused from addressing these potential

impairments in his opinion. See 20 C.F.R. §§ 404.1512, 404.1520(a)(4)(ii); Rodriquez v. Sec'y of Health & Human Servs., 46 F.3d 1114, *4 n. 14 (1st Cir. 1995); Gray, 760 F.2d at 372; O'Dell v. Astrue, 736 F.Supp.2d 378, 390 (D.N.H. 2010).

B. Treating Source Opinion

Boston also claims that the ALJ committed reversible error by failing to accord controlling weight to the opinion of Dr. Shirley. Dr. Shirley, who had treated Boston for over ten years, filled out an RFC questionnaire in which he opined that Boston suffered from significant functional limitations which, if credited, would support a finding of disability. (Tr. 23-24, 375-80). Underlying his opinion, Dr. Shirley noted, were clinical and objective signs of: pain, crepitus, and decreased range of motion in the right knee, severe tenderness/pain in her lumbosacral spine, positive flip test and positive strait leg raising. (Tr. 375). While the ALJ recognized Dr. Shirley's opinion, he afforded it less weight than that of state physician Dr. Meader because of its inconsistency with the record. (Tr. 35).

A treating source's opinion will be given controlling weight if it is well supported by medically acceptable clinical

diagnostic techniques and is not inconsistent with other substantial evidence in a claimant's case record. See SSR 96-2p, 1996 WL 374188, at *2 (July 2, 1996). When a treating physician's opinion is not given controlling weight, its weight is dependent on the factors provided in 20 C.F.R. §§ 404.1527 and 416.927. Id. at *4. These include: the evidence provided to support the opinion, the degree to which the opinion is consistent with the record, the extent of the treating source's knowledge of the impairment and other factors that are raised by the claimant. See 20 C.F.R. § 404.1527(d)(1)-(6).

Dr. Shirley's opinion is inconsistent with substantial evidence in the record and therefore the ALJ was justified in according his opinion less weight. See 20 C.F.R. § 404.1527(d)(2)-(4); Irlanda Ortiz, 955 F.2d at 769-70. First, Dr. Shirley's opinion is inconsistent with his objective findings. See 20 C.F.R. § 404.1527(d)(2)-(4). While Dr. Shirley indicated that his RFC was based on clinical findings of decreased range of motion in the right knee, severe tenderness/pain in her lumbosacral spine, positive flip test and strait leg raising, his treatment notes consistently state that Boston had a full range of motion of all joints, that flip and

strait leg tests failed to elicit back or leg pain, and that she had full motor strength. (Tr. 165, 167, 169, 171, 178, 180, 182, 212-15, 218-19, 221, 223-25). Moreover, Dr. Shirley's opinion that Boston suffers from severe tenderness/pain in her lumbosacral spine is not entirely consistent with Boston's professed ability to perform certain activities of daily living including: sweeping and washing the floors, emptying the trash, doing the laundry and taking care of her husband. See 20 C.F.R. § 404.1529(c)(3); (Tr. 130). Finally, Dr. Shirley's opinion is inconsistent with the opinion of Dr. Meader. After reviewing Boston's medical records and other evidence, Dr. Meader opined that Boston retained the ability to perform the physical requirements of a sedentary job. See (Tr. 227). While Dr. Meader is a non-treating physician, his opinion is detailed and well supported with objective medical evidence contained in the record.[16] See 20 C.F.R. § 404.1527(d)(ii)(3); Berrios Lopez v.

[16] Dr. Meader, who formulated his RFC before Dr. Shirley completed his own, noted that he relied primarily on the findings of Dr. Shirley. The fact that Dr. Meader determined Boston retained the RFC to perform sedentary work based on Dr. Shirley's objective findings is itself evidence of the inconsistency between Dr. Shirley's treatment notes and her own RFC.

Sec'y of Health & Human Servs., 951 F.2d 427, 431 (1st Cir. 1991); (Tr. 233).

While other aspects of the record support Dr. Shirley's opinion, the fact remains that his opinion is also inconsistent with substantial evidence in the record. As a result, it was within the ALJ's discretion to afford his opinion less weight. I cannot upset this decision. See Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981)("the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for [the ALJ] not for the doctors or for the courts").

C. RFC to Perform Sedentary Work[17]

Finally, Boston contends that the ALJ's determination that she retained the residual functional capacity to perform the full range of sedentary work was not substantially supported. Specifically, Boston contends that the ALJ failed to comprehensively describe her limitations in the series of hypotheticals he posed to the VE because he neglected to

[17] Because the ALJ's determination that Boston retained the ability to perform sedentary work is supported by substantial evidence, I need not pass on the ALJ's additional determination that she could perform her past relevant work.

incorporate her mental limitations and the RFC of Dr. Shirley.[18]

At step five of the sequential evaluation process the burden shifts to the ALJ to show that there are jobs in the national economy that the claimant can perform given her RFC. Heggarty v. Sullivan, 947 F.2d 990, 995 (1st Cir. 1991). One way for the ALJ to carry his burden is through the testimony of a VE.

> But in order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities. To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.

Arocho v. Sec'y of Health & Human Servs., 670 F.2d 374, 375 (1st Cir. 1982).

In this case, the hypotheticals the ALJ posed to the VE

[18] Boston also faults the ALJ for his reliance on the opinion of Dr. Meader who she contends "did not have the benefit of reviewing over 300 pages of medical records added to the record since he reviewed the case." Pl.'s Mot. for Order Reversing Decision of the Commissioner at 8. However, Boston makes no attempt to address how the additional un-reviewed medical records would upset Dr. Meader's opinion. See Senay v. Astrue, C.A. No. 06-548S, 2009 WL 229953, *4 (Jan. 30, 2009).

accurately corresponded with limitations drawn from the ALJ's RFC, which itself was supported by substantial evidence. See id. As previously explained, Boston did not carry her burden of proving that she suffered from a mental limitation.[19] Therefore, the ALJ did not err when he omitted Boston's purported mental limitations from his hypotheticals. Similarly, because the ALJ was justified in excluding Dr. Shirley's opinion from the RFC, Dr. Shirley's limitations also needn't be reflected in the ALJ's line of questioning. See Gallagher v. Astrue, No. 08-CV-163-PB, 2009 WL 929923, *8-*9 (Apr. 3, 2009). As a result, the ALJ, through the testimony of the VE, carried his burden of proving that Boston can perform jobs that exist in significant numbers in the national economy.

IV. CONCLUSION

The ALJ's decision is supported by substantial evidence in the record. Therefore, I am without the authority to overturn it. Plaintiff's motion for order affirming the decision of the

[19] While the ALJ bears the burden of proving the existence of jobs given the claimant's RFC, the claimant bears the burden of proving the limitations that factor into the RFC. 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2).

Commissioner (Doc. No. 10) is granted, and the plaintiffs' motion for order reversing the decision of the Commissioner (Doc. No. 9) is denied. Accordingly, the clerk shall enter judgment and close the case.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

June 22, 2011

cc: Raymond J. Kelly, Esq.
Gretchen Leah Witt, Esq.